No. 203.
Brf. of Green for Pl'ff in Error
CONSTITUTIONALITY OF BANKRUPT ACT.

FILED
SEP 30 1901
JAMES H. McKENNEY,
Clerk.

Filed Sept. 30, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 203.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

MAX MOYSES, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

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For Plaintiff in Error.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

This writ of error presents for review a final judgment rendered in the circuit court of the United States for the eastern district of Tennessee in favor of the defendant in error after demurrer sustained to the amended declaration. The question involved is the constitutionality of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898. The amended declaration averred the execution of a

certain promissory note by defendant in error, payable to the Bank of Greenville, in Mississippi; the endorsement thereof to plaintiff in the State of New York, the State of plaintiff's domicil and residence; default in payment; suit in the State court of Mississippi having jurisdiction *in personam* against defendant in error, then a citizen and resident thereof, by plaintiff; recovery of judgment *in personam* therein against defendant in error; the non-satisfaction and non-reversal of said judgment; and prays judgment *in personam* against defendant in error upon said judgment. Avers that after the rendition of the judgment in Mississippi defendant changed his domicil and residence to the State of Tennessee, and then, not being a merchant or trader or engaged in business or any commercial pursuits or using the trade of merchandise and being without mercantile business of any kind, defendant filed his voluntary petition in the district court of the United States for the eastern district of Tennessee, the district of his residence, to be adjudged bankrupt, which was done, and in pursuance thereof he was granted his discharge. Avers that if said discharge is valid plaintiff cannot recover, but avers that it is void because said act and said proceedings thereunder violated the Federal Constitution in the particulars averred and hereinafter set forth; that plaintiff was and has continued to be domiciled in and resident of New York; that it was not a party to said proceedings in bankruptcy, nor did it enter its appearance therein for any purpose, nor did it prove its claim, nor did it in any way subject itself to the jurisdiction of said court in said proceedings; that plaintiff, a non-resident of Tennessee, was not served with process of any kind upon said petition for adjudication and had no notice, personal or

otherwise, of said proceeding by said voluntary petition for said adjudication, and no notice of such proceedings to adjudicate a person a bankrupt required by said act of Congress; that the *situs* of said promissory note and judgment was never within the jurisdiction of said district court, and that said district court never acquired jurisdiction of plaintiff nor of the debt sued on.

The amended declaration sets out specifically the sections of the act and the provisions of the Federal Constitution violated by them, and they will be referred to *infra*.

This amended declaration was demurred to because, 1st, said act has never been declared unconstitutional by any Federal court; 2d, said act is valid and constitutional.

From a final judgment sustainjng this demurrer and dismissing the suit the plaintiff sued out this writ of error and complains of this action of the court.

Specification of Errors.

The court erred in sustaining the demurrer to the amended declaration in that the alleged discharge under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, is a nullity, because:

1. Said act violates the fifth amendment to the Constitution of the United States in this:

(*a*.) It does not provide for notice as required by due process of law to the creditor in voluntary proceedings for adjudication of bankruptcy and for discharge of the debt of the creditor.

(*b.*) Ten days' notice by mail to creditors to oppose discharge is so unreasonably short as to be a denial of notice.

(*c.*) The grounds of opposition to a discharge are so unreasonably limited as, substantially, to deny the right of opposition to a discharge. Thereby the act is also practically a legislative promulgation of a discharge, contrary to article III, section 1, of the Federal Constitution.

2. Said act violates article I, section 8, paragraph 4, of the Constitution in this:

(*a.*) It does not establish *uniform laws* on the subject of bankruptcies throughout the United States.

(*b.*) It delegates certain legislative powers to the several States in respect to bankruptcy proceedings.

(*c.*) It provides that others than traders may be adjudged bankrupts and that this may be done on voluntary petitions.

1. (*a.*) THE BANKRUPT ACT OF 1898 IN PROVIDING FOR VOLUNTARY PROCEEDINGS VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT DEPRIVES THE CREDITORS OF THE BANKRUPT OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The fifth amendment is a limitation upon the powers of Congress (*Den v. Hoboken, &c., Co.*, 18 How., 272; *Eilenbecker v. Plymouth Co.*, 134 U. S., 31; *Brown v. New Jersey*, 175 U. S., 174).

> "Due process of law" is used by judges "as implying correct and orderly proceedings, which are

> due because they observe all the securities for private right which are applicable to the particular case. In this sense it is synonymous with 'the law of the land' as used in the famous 29 chapter of Magna Charta" (*Cooley Prins. Cons. Law*, pp. 241, 242; *Hovey v. Elliot*, 167 U. S., 414). "The essential elements of due process of law are notice and an opportunity to defend. In determining whether such rights were denied we are governed by the substances of things and not by mere form" (*Railroad Co. v. Schmidt*, 177 U. S., 230; *Simon v. Craft*, 182 U. S., —).

A statute conferring upon a tribunal power to finally dispose of the property rights of an individual and failing to provide for notice denies due process of law. The fact of notice without a law authorizing it does not constitute the notice of the constitution (*Chicago, &c., R'y v. Minnesota*, 134 U. S., 456–'7; *Kunty v. Sumption*, 117 Ind., 1).

Notice of Voluntary Proceedings under said Act. Character of Notice Required to Discharge Non-resident Creditors' Debt.

The act provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt" (sec. 4*a*), and that "upon the filing of a voluntary petition the judge shall hear the petition and make adjudication or dismiss the petition" (sec. 18*g*). There is no defendant to the petition, no process or notice thereof is required, but the judge "*shall hear the petition*," and if it conforms to the act an adjudication of bankruptcy is made, as of course.

The petitioner, plaintiff, names in his schedules filed with the petition the persons and addresses of his creditors.

These creditors, *after* adjudication (sec. 55) and without opportunity to be heard *before that judgment is rendered*, are then given at least ten days' notice by mail (sec. 58) of the first meeting of creditors. Like notices are provided for in the further *administration of the estate* (sec. 58). After one month and within twelve months after the adjudication the bankrupt may be discharged upon his own petition, *as of course*, unless creditors, after at least ten days' notice by mail to the addresses given by the petitioner, appear and prove that the bankrupt has committed a felony under the act in the administration of his estate (sec. 29), or that in contemplation of bankruptcy with intent to conceal his true financial condition he has destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained (sec. 14*a–b*). No other grounds of objection, except this commission of crime, are allowed to the creditors to defeat the discharge.

The adjudication, *per se*, entitles a bankrupt to a discharge from the obligation to the creditor unless the creditor, on ten days' notice by mail to his address, as given by the debtor, can affirmatively show that the bankrupt has committed crime under the act. The grounds of opposition to the discharge allowed do not draw in question for review the adjudication itself. Thus, *by the adjudication*, not only is there a judgment or declaration of bankruptcy, but also, in effect, a discharge or release of the debtor from the obligation of the contract or liability to the creditor, and during this period of the proceedings the creditor has no notice of and is not a party to the proceedings.

An analysis of the precise character of proceedings pro-

vided under the act of 1898 is necessary to determine whether it provides due process of law for the creditor.

No case involving the constitutionality of the several bankrupt acts has ever been decided by this court, and this court has never defined their extent and interpretation in this regard, and hence the questions presented by this record are *novæ res* in this court. Speaking generally, it was said in *Shawhan v. Wherritt*, 7 How. (U. S.), 643, that proceedings in bankruptcy were "in the nature of proceedings *in rem*," and in *New Lamp Chimney Co. v. Brass & Copper Co.*, 91 U. S., 661, 662, that a decree adjudging a corporation bankrupt is in the nature of a decree *in rem*, as respects the *status* of the corporation, and in *Graham v. Erie R. R. Co.*, 118 U. S., 179, this doctrine was reaffirmed; but none of these cases undertake to determine in what particulars it is an *in rem* proceeding, nor of what the *res* consisted nor whether the discharge was a part of the *res*.

A discharge is not a necessary element in proceedings in bankruptcy (*In re Calif. Pac. R. R. Co.*, 11 N. B. R., 193).

In *Baldwin v. Hale*, 1 Wal., 233, this court entered more particularly upon a definition, saying:

> "Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice or an opportunity to be heard."

There is no difference in principle in the character of such proceedings in the State and Federal courts.

"Such proceedings are judicial in their nature, so that jurisdiction over the person of the creditor is essential. Notice is requisite to jurisdiction in such cases, and can no more be given in insolvency proceedings than in personal actions when the party to be notified resides out of the State; and, hence, a discharge under a State insolvent law will not and cannot discharge the debt due to a citizen of another State unless the latter appears" (*Hawley v. Hunt*, 27 Ia., 303; *Pratt v. Chase*, 44 N. Y., 597; *Soule v. Chase*, 39 N. Y., 342; *Hills v. Carlton*, 74 Me., 156; *McDougall v. Page*, 55 Vt., 187).

Of the Relation of Debtor and Creditor.

The relation of debtor and creditor has a dual aspect and contains two separate elements. The one is the right of the creditor to resort to present property of the debtor through the courts to satisfy the debt; the other is the personal obligation of the debtor to pay the debt, and that he will devote his energies and labor to discharge it, and this element exists regardless of the existence *vel non* of property. Chief Justice Marshall said:

"But it is not true that the parties have in view only the property in possession when the contract is formed or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself" (*Sturges v. Crowninshield*, 4 Wheat., 198).

The debt, *per se*, constitutes neither *jus ad rem* nor *jus in re*. Under judicial sentence the debtor's property may be subjected to its payment. In the absence of property the

personal obligation to pay constitutes the only value of the debt.

Bankruptcy statutes must deal with the debtor and his property in this dual relation. The adjudication of bankruptcy usually is the judgment, rendered at the suit of creditors, judicially declaring that the debtor has committed an act of bankruptcy—primarily a fraud—and which adjudges him bankrupt and directs his estate to be seized and held *in custodia legis* for distribution among his creditors. This is the function performed by the adjudication under the English statutes in force in 1787 and prior thereto and under the bankrupts' acts of 1800 and 1841. Essentially the adjudication should deal with the distribution of the property in possession of the debtor. It bears no proper relation to the discharge of the personal obligation of the contract (*In re Calif. Pac. R. R. Co.*, 11 B. R., 193, *supra*). To the extent that the procedure seizes and administers the property it might be said that it is in the nature of a proceeding *in rem*, but in dealing with the discharge of the debt it is *in personam*.

The decisions of this court on the subject of divorce shed light upon the principles here involved. Where in the State of the domicile of the complaining spouse divorce is sought, and the marriage was contracted in that State, it was held that, as the object of the proceeding was to annul the marriage relation, it was competent for the State court to annul the marriage upon constructive notice to the non-resident spouse, but that if a recovery of alimony was sought—*i. e.*, an enforcement of the contractual obligation of the non-resident spouse for support—before jurisdiction

could be acquired there must be personal service of process or personal appearance (*Atherton v. Atherton*, 181 U. S., 155).

Upon the question of the civil status of the parties—*i. e.*, the existence or not of the marital relation—the decree of the court of the State of the complaining spouse upon constructive service of process is conclusive upon the world, being a proceeding *in rem* and by a court having jurisdiction of the *res* (2 *Bishop Mar. Div. & Sep.*, 140; *Pennoyer v. Neff*, 95 U. S., 734–'5; *Roller v. Holly*, 176 U. S., 403; *Arndt v. Griggs*, 134 U. S., 316).

In this the marriage relation may be likened to the proceeding to appropriate the debtor's present property to the payment of his debts, and the proceeding *in personam* for alimony to the proceeding for discharge from the obligation of the debts.

The rule is settled in England that a discharge in bankruptcy is valid throughout the world; but it is equally well settled in the United States that a discharge under the laws of one government does not affect contracts made in another in the absence of personal service on the owner (*McMillan v. McNeill*, 4 Wheat., 213; *Ogden v. Saunders*, 12 Wheat., 255; 2 Rose's Notes on U. S. Repts., 568).

The power exists in the State, in the absence of an exercise by Congress of its power, to pass bankrupt or insolvent laws, and it is settled that such laws have no *extra* territorial force (*Sturges v. Crowninshield, supra; Pennoyer v. Neff, supra; Ogden v. Saunders, supra; Roller v. Holly, supra*). This could not be if they were proceedings *in rem*, as they would then be conclusive upon all the world.

This construction finds confirmation in the act of 1898, section 2 (1), by the provision that persons who have been

adjudged bankrupt in a foreign government and who have *property* in the United States may be adjudged bankrupt here.

Such an adjudication in the United States would of necessity be an original and not an ancillary proceeding, and even if ancillary it demonstrates that the foreign proceeding does not bind in the United States, either as to property in the United States or to discharge.

The act itself clearly confines the jurisdiction to the territorial limits of the court, and even provides for the extradition of the bankrupt from one district to another (secs. 2 (14), 10).

A discharge under the bankrupt act by a district court of the United States is not a bar to a proceeding in the domicile of the debtor by a foreign—Canadian—creditor upon a contract made in Canada (*McDougall v. Page*, 55 Vt., 187; S. P., *Baldwin v. Hale*, 1 Wal., 228, *supra*; 1 Rose's Notes on U. S. Repts., 849).

A discharge in bankruptcy goes to the merits and not to the process or remedy (*Reimsdyk v. Kane*, 1 Gal., 371; *McDougall v. Page*, 55 Vt., 187). It was held in *Lathrop v. Drake*, 91 U. S., 517, to belong to the local and not to the transitory element of the jurisdiction of the court.

If, as settled by the adjudications, *supra*, the power of the government of the domicile of the debtor extends only to the condemnation of present property in liquidation of the debts contracted in the jurisdiction of that government, and that it does not extend to the discharge of the obligations of the contracts made in a foreign country, except upon acquisition of jurisdiction of the person of the creditor, it would

seem that bankruptcy proceedings could not be a proceeding *in rem*, and especially not in providing for a discharge.

Section 2 (1) recognizes that the *property* of the foreign bankrupt in the United States is not bound by a foreign adjudication, and that it may be placed *in custodia legis* here under this act. If the adjudication was *in rem* against the *status* of debtor as debtor, then no such result would be possible.

To exercise judicial power over the creditor and his debt the *situs* of the debt must be within the power or jurisdiction of the court. The fact that the debtor and all of his property may be in the territorial jurisdiction of the court cannot avail to give jurisdiction over the creditor or his debt. From this it is clear that any proceeding which seeks to bind the creditor's debt cannot be predicated alone on jurisdiction of the debtor and all of his property. There is this personal right of the creditor outside of and disconnected with the *status* of the debtor and of the debtor and of his property, which cannot be reached except by personal service.

Familiar illustrations arise in the application of the *lex loci solutionis*, whereby *lex loci contractus* is made inapplicable, except as to interpretation of the contract.

In the case at bar the promissory note was made and was payable in Mississippi, and the judgment was rendered thereon in that State in favor of plaintiff, a resident of New York, to whom the note had been indorsed in New York. The court in Tennessee never had jurisdiction of the debt of the creditor.

> "*The thing* in dispute is not in Mississippi, but in Tennessee. The debtor was here, and the land on

which the notes are charged by a deed of trust is here, but the debt is where the creditor is and that was in Tennessee" (*Cocke v. Brewer*, 68 Miss., 778; S. P., *Bush v. Nance*, 61 Miss., 237; *Railroad v. Smith*, 70 Miss., 346–'7; *State v. Smith*, 68 Miss., 79; *Am. Ins. Co. v. Hettler*, 37 Neb., 849; *Reimers v. Seatco Mfg. Co.*, 70 Fed., 573; *Fitch v. Browner*, 42 N. J. Eq., 300).

In administration of estates this court held that the right of the domiciliary administrator was superior to the foreign administrator to a debt due by the United States, as the United States was ubiquitous. But in Mississippi administration on the estate of a non-resident is held to be original and not ancillary (*Carroll v. McPike*, 53 Miss., 569).

The settled law of Mississippi would fix the *situs* of the Mississippi contract with the creditor in New York.

The whole theory of the law is that bankruptcy and insolvency proceedings are essentially personal between debtor and creditor, and not that they are *in rem* against the *status* of the debtor (*Barnes v. Moore*, 2 N. B. R., 573). It is established that the States have plenary power over the *status* of their citizens. If bankruptcy was a proceeding *in rem* against the *status*, it must follow that the States have power to dissolve the relation of debtor and creditor by rendering a decree *in rem* against the *status* of debtor and dissolving the relation. If it is the *status* alone that is involved, the power of the State would be as full as in cases of divorce, or of foreign attachment, or of any other proceeding *in rem*. Their is no impairment of the obligation of a contract within the meaning of the Federal Constitution in proceedings in a State court *in rem*, upon constructive notice, to deal with non-residents' property where the court has jurisdiction of

the *res* (*Pennoyer v. Neff, supra; Roller v. Holly, supra*, and other cases cited *supra*).

The common practice is to administer property for the benefit of creditors in equity, but the court can only fix the rights of creditors in the *res* in the jurisdiction of the court, and can make no decree against non-resident creditors without personal service affecting the personal obligation of the debtor (*Pennoyer v. Neff*, 95 U. S., 727).

Section 738, United States Revised Statutes, provides for constructive service in such cases, but it does not even pretend to bind *in personam* upon such service.

Proceedings in involuntary bankruptcy may be likened in some degree to an attachment proceeding at law. The writ of attachment issues upon affidavit of the existence of certain statutory grounds, and the property is seized and placed *in custodia legis*. If the defendant is a resident, he is personally served with process; if non-resident, he is notified by publication of process. If the defendant appears or is personally served, the suit has two branches—one, *in rem*, the attachment; the other, *in personam*, the action for the recovery of the debt (*Bates v. Crow*, 57 Miss., 676).

In involuntary proceedings under the act there is *actor reus et judex*. The administration of the estate is in the nature of an *in rem* proceeding, but the discharge from the obligations constitutes an *in personam* proceeding. In voluntary proceedings under the act of 1898 the debtor is *actor*. There is no *reus*, and the proceeding is *felo de se*. The only status the voluntary petitioner must occupy is the *averment* that he owes debts, is a resident of the district, and desires to be adjudged bankrupt. It is not a proceeding by the creditor, nor is there a seizure of the property under the

power of the court. Like Artemus Ward's Hamlet, he dies to slow music produced by himself. The surrender of the property is a voluntary act and without the right of the creditor to be heard in opposition. It is essentially a personal proceeding by the debtor, in which he seeks to be discharged from the personal obligation of his debts and to obtain a decree against his creditors, without any notice to them, upon the surrender of his present property.

The court in *Whitney v. Bank*, 71 Miss., 1017, in the absence of statute, held that a proceeding by a debtor on his own *ex parte* application to have his property put into the hands of a receiver was absolutely void. There must be a defendant to an action; otherwise it is a nullity (*Barbour v. Albany Lodge*, 73 Ga., 474; *Mexican Mill v. Yellow Jacket Silver Min. Co.*, 97 Am. Dec., 510).

The adjudication upon such voluntary petition, if valid, is necessarily a proceeding *in personam*, for there is no seizure of any property. No property comes *in custodia legis* until *after* the adjudication and by force of its operation alone. No parties are made defendant. The schedules of creditors filed only become operative in the proceeding after and because of the adjudication. The essence of the proceeding is the debtor's voluntary proposition to surrender his property for distribution among his creditors, and if this voluntary proposition is accepted by the court—and no discretion is allowed if it conforms to the statute—then, as shown, a discharge from personal obligation follows as of course, unless the creditor shows beyond a reasonable doubt that the bankrupt has committed a crime under the terms of the act.

What character of notice must be given to non-resident creditors under the Constitution to discharge their debts?

Whether voluntary proceedings under the act of 1898 are proceedings *in rem* or *in personam* or both *in rem* and *in personam*, the notice provided by that act does not constitute due process of law, and upon the notice provided the district court of the United States for the eastern division of Tennessee could not acquire jurisdiction to grant the discharge of the debt of plaintiff in error.

The jurisdiction in bankruptcy proceedings under the act of 1867 was declared in *Lathrop v. Drake*, 91 U. S., 517, to contain two jurisdictional elements:

"First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition and ending in the distribution of the assets among the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction as an ordinary court of suits at law and in equity brought by or against the assignee in reference to the alleged property of the bankrupt or to the claims alleged to be due from or to him."

The first element was held to be locative and to be exercised within the territorial limits of the district, and the second to be transitory and to be exercisable everywhere. The contention there was that "in their respective districts" meant that the whole jurisdiction was locative. That case approves *Sherman v. Bingham*, 7 N. B. R., 492, wherein it was expressly held that, as to the first element of jurisdiction, *issuance of process was confined to the territorial limits of the court* (S. C., 8 *Rose's Notes on U. S. Repts.*, 714).

The act of 1898 emphasized the ruling that the first

element of jurisdiction was locative by confining jurisdiction to the "territorial limits" of the district courts (section 2), and by extradition of the bankrupt from one district to another (*id.*, 14).

Section 10. As to the second element of jurisdiction (section 23), the courts of the United States have jurisdiction of such cases only as they would have had if the suit had been brought between the bankrupt and adverse claimants, except by consent of the defendant, and in all other cases the transitory jurisdiction continues with the State court. Thereby the act of 1898 denies the rule announced in *Lathrop v. Drake, supra*, that the powers or jurisdiction of the district courts extend to all matters of bankruptcy without limitation, and confines the jurisdiction to their locative character. This leaves the jurisdiction of the district courts in this regard to be governed by the general rules applicable to them.

The jurisdiction of one district court is foreign to that of another, and jurisdiction *in rem* cannot be exercised beyond its territorial limits (*Ex parte Devoe*, 108 U. S., 401; S. C., 10 *Rose's Notes on U. S. Repts.*, 579; *Picquet v. Swan*, 5 Mason, 35; *Toland v. Sprague*, 12 Pet., 300; *Sherman v. Bingham*, 7 N. B. R., 492). A Federal court can acquire jurisdiction only by service of process within the district (*Herndon v. Ridgway*, 17 How., 424; S. C., 5 *Rose's Notes on U. S. Repts.*, 487; *United States v. Am. Lumber Co.*, 85 Fed., 827), or by voluntary appearance. A Federal court in one State cannot bring into its jurisdiction property in another State (*Booth v. Clark*, 17 How., 322; *Atkins v. Wabash R'y Co.*, 29 Fed., 172). Proceedings to appoint a receiver have no *extra*-territorial effect. The only way to acquire jurisdiction of prop-

erty and persons in a foreign district is by ancillary appointment of a receiver in that district (*Broom v. Armstrong*, 137 U. S., 278).

To give jurisdiction *in rem*, the subject proceeded against must be in the actual jurisdiction and control of the court; otherwise no jurisdiction exists (*Taylor v. Carryl*, 20 How., 600–'1).

There was no territorial jurisdiction, therefore, under the act of the plaintiff in error or of its debt in the district court of Tennessee, and as to that court and proceeding plaintiff was in a foreign country.

If the proceeding is treated as *in rem*, there was not due process of law.

> "The seizure of the *res* and the *publication* of the monition to appear are regarded (in proceedings *in rem*) as equivalent to the particular service of process in the courts of law and equity" (*Taylor v. Carryl*, 20 How., 600–'1).

But here there is no seizure of the *res*. The creditor and the debt are in the foreign State, outside the jurisdiction of the court, and in voluntary proceedings (if it could be treated as a seizure) the surrender of the debtor's property does not deprive the creditor of the possession of anything.

But, added to the notice by the seizure in proceedings *in rem*, there must be, before condemnation, a monition published commanding all persons in interest to appear and show cause. The only consequence of the failure to so appear and contest, under the constructive notice, is that jurisdiction is conferred on the court to deal with the *res* seized; but such dealing can in no degree impair the personal obligation of the debt.

In *Windsor v. McVeigh*, 93 U. S., 279, it is said:

"A judgment *in rem*, at least when against anything, binds the *res* in the absence of any personal notice to the parties interested. Those parties even in the absence of personal notice are to be regarded as parties to the suit. It is more accurate to say that the parties in interest are bound by the judgment although they have no actual notice. The mere seizure of the property does not confer jurisdiction upon the court to proceed to judgment. A sentence rendered simply from the facts of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will therefore operate to impart notice to him. When notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and the exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is, not to pass on the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owners and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings beyond that arising from seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some form. The manner of the notification is immaterial but the notification itself is indispensable" (S. C., 8 *Rose's Notes on U. S. Repts.*, 957).

To like effect is the opinion of Marshall, C. J., in *The Mary*, 9 Cr., 126, 142, 146. In the *New Lamp Chimney Co. v. Copper Co.*, 91 U. S., 656, it was held that bankruptcy proceedings require *due notice*, being in their nature *in rem*.

> "Certainly nothing is to be gained by saying that the proceeding is one *quasi in rem*, for in all such, notice to the party to be affected or bound, either actual or constructive, is absolutely essential" (*Schlitz v. Roenitz*, 86 Wis., 41; S. P., *Graham v. R. R. Co.*, 118 U. S., 179).

Proceedings *in rem* or *quasi in rem* are not exempt from the operation of the rule which makes service of notice in some form an essential to jurisdiction (*Cooley Cons. Lim.* (2d ed.), 498–'9; *Wells on Juris.*, sec. 88; *Waples Proc. in Rem*, sec. 588, 570, *et seq.*; *Woodruff v. Taylor*, 20 Vt., 65; *Denning v. Corwin*, 11 Wend., 647; *Freeman v. Thompson*, 53 Mo., 196; *Fencher v. Keyl*, 48 Ohio St., 366; *Zentzler v. Thayer*, 10 Colo., 64; *Dorr v. Rohr*, 82 Va., 359; *In re Empire City Bank*, 18 N. Y., 199; *Bradstreet v. Insurance Co.*, 3 Sum., 608 (per Mr. Justice Story); *Schlitz v. Roenitz*, 86 Wis., 40).

The rule in *Windsor v. McVeigh*, *supra*, was followed in *Hassall v. Wilcox*, 130 U. S., 504, wherein the court said:

> "But we do not think that the proceeding in the State court can be sustained as one *in rem*. It is essential to such a proceeding that there should at least be constructive notice, by some form of publication or advertisement, to adverse claimants to appear and maintain their rights before a judgment in such a proceeding can operate even as *prima facie* evidence."

To like effect are *Scott v. McNeal*, 154 U. S., 46; *Hovey v. Elliot*, 167 U. S., 414.

In *Roller v. Holly*, 176 U. S., 409, this court emphatically declares:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give weight."

In *Chicago R'y Co. v. Minnesota*, 134 U. S., 456, the State court interpreted the finding of the State commission as to equality and reasonableness of rates, under the statute, as final, holding:

> "That law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that under the statute the rates published by the commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable, and that in a proceeding for mandamus under the statute, there is no fact to traverse except the violation of the law in not complying with the recommendations of the commission. * * * This being the construction of the statute," this court says, "it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of a judicial investigation, by due process of law, under the form and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which in view of powers conceded to it by the State court cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. * * * No hearing is provided

> for, no summons or notice to the company before the commission has found what is to be found and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law" (456–'7).

If this court had been paraphrasing the act of 1898 in its voluntary features, the same language could have been used. The adjudication here is to be by the judge or referee in vacation upon the face of the petition and without any provision for any defendant, process, notice, or hearing, and the rights of creditors are to be bound by such judgment and their debts discharged, and the only right to a hearing on the discharge is limited to the commission of a crime under the act in the administration of the estate.

Applying these principles to the provisions of the act of 1898, it appears that the seizure of the *res* in an *in rem* or *quasi in rem* proceeding will not be sufficient notice to persons in interest to authorize the court to proceed to a judgment of condemnation.

> "In cases within the class, notice to all concerned is required to be given, either personally or by some species of publication or proclamation; and if not given the court which had jurisdiction of the property will have none to render judgment" (*Cooley Con. Lim.* (5th ed.), 497).

If, therefore, the proceeding should be treated as *in rem* or *quasi in rem*, there could be no power in any court, under the Constitution, to render judgment of condemnation by the adjudication without first giving either actual or con-

structive notice to creditors, and as this act makes no such provision it is not due process of law.

If, as we insist, the proceedings provided by the act, especially as to the discharge, are *in personam*, then, as there is no pretense of any personal service provided for, the act would not afford the creditor due process of law.

1. (*b.*) THE ACT ONLY PROVIDES FOR AT LEAST TEN DAYS' NOTICE BY MAIL OF THE STEPS OF WHICH NOTICE IS TO BE GIVEN, AND THIS TIME IS TOO SHORT TO BE DUE PROCESS OF LAW.

This court considered this question in *Roller v. Holly*, 176 U. S., *supra*, and there held that what was or was not reasonable notice must be determined by the subject-matter of the statute in its application to the creditor. In that case five days' notice was held unreasonable. When the application of this statute is considered and it appears that the ten days' notice to creditors resident, perhaps, in Maine, with the bankruptcy proceedings in California or Hawaii, and that the grounds of opposition to discharge are limited to the proof of the debtor's crime under the act, we insist that ten days is an unreasonably short time to get the notice to the creditors by mail, and for him to take such steps, by investigation or otherwise, as may be necessary to protect his rights and make defense against the application. In the case at bar this court judicially knows the distance the notice would have to go to reach plaintiff; then plaintiff would have to go or send to Mississippi to inquire into the estate of his debtor, and whether in his removal to Tennessee he had not fraudu-

lently left his property; then, with the knowledge there gained, investigation would have to be made of the conduct of debtor under the act; or, if his books had to be examined, ten days is not a reasonable time to detect fraudulent entries in a set of fraudulently kept mercantile books, and to ascertain the facts in regard to the entries to determine their falsity or not. It is not possible to ferret out the crimes or frauds of the debtor upon ten days' notice to foreign creditors—strangers to the locality and to the debtor's affairs and business.

Power does not exist, under the Constitution, in Congress to deprive the creditor of all right to be heard on the vital queston of adjudication. But even if this power were sustained, there does not exist in Congress power to restrict the right to the discharge solely upon the ground of the commission of crime under the act.

Under the English bankruptcy acts in force in and prior to 1787 the discharge, if any, of the bankrupt was the voluntary act of the creditors. Such, substantially, were the provisions of the acts of 1800 and 1841 (2 U. S. Stats. at Large, 31; 5 Stats. at Large, 444). By the act of 1867 there was introduced the power of the court, *in invitum*, as to the creditors to discharge the debtor after adjudication. The existence of this power in Congress was denied by Mr. Justice Bronson in his unanswerable opinion in *Suckett v. Andros*, 5 Hill, 327. The English acts merely provided a remedy for the creditor, whereby, on account of some fraudulent practices, he could have the effects of his merchant debtor seized and distributed *pro rata*, and then, if a discharge was granted, it was done by the *voluntary act of the creditors.*

1. (c.) UNREASONABLE LIMITATION ON RIGHT TO OPPOSE DISCHARGE.

Legislation cannot deprive a party of the right to resort to the courts for the adjudication of his rights, and the imposition of such unreasonable restrictions is not due process of law (*Barron v. Burnside*, 121 U. S., 186; S. C., 11 *Rose's Notes on U. S. Repts.*, 336). Reasonable limitations upon the *remedy* are valid (*Wheeler v. Jackson*, 137 U. S., 245; S. C., 11 *Rose's Notes on U. S. Repts.*, 1059; *Campbell v. Haverhill*, 155 U. S., 615).

It is clear that Congress could not by legislation, *ex propria vigore*, declare that any class of persons should be discharged of their debts. It has power by reason of the delegation of the Constitution to enact a uniform system of laws on the subject of bankruptcies throughout the United States and to provide for the execution thereof. Under this power a system may be enacted and a discharge of the debt may be provided for, but the administration of this system and the decisions of the rights of creditors thereunder are *judicial*, and not *legislative*, functions, and Congress cannot exercise them (*Cooley Cons. Lim.* (5th ed.), 106 *et seq.*). Congress cannot do indirectly what it cannot do directly. If it could not legislatively declare that a debtor who owed debts and desired to surrender his property in satisfaction thereof might be so discharged by making affidavit of such desire and delivering his property to the marshal of his district, then it could not enact the same thing, substantially, in the form of a bankrupt act. The only judicial function the court performs under this act is to administer the property

among the creditors and, as of course, to discharge the debtor.

A material difference is to be noted in this act and all the prior acts. Under the act of 1867 the grounds of opposition were very numerous and afforded the creditor opportunity to be heard. The acts of 1800 and 1841, as shown *supra*, were even more favorable to the creditor and afforded the creditor a hearing in the case on its merits. No such opportunity is given under the act of 1898, and hence that act is fatally defective therein. A man is deprived of his property without notice, without being a party to the proceeding, and without an opportunity to be heard in his defense. We may well exclaim, with the learned justice who delivered the opinion in *Windsor v. McVeigh, supra:*

> "It is difficult to speak of a decree thus rendered with moderation, it was in fact a mere arbitrary edict clothed in the form of a judicial sentence!"

2. (*a*.) THE ACT OF 1898 VIOLATES ARTICLE I, SECTION 8, PARAGRAPH 4, OF THE CONSTITUTION OF THE UNITED STATES, IN THAT IT DOES NOT PROVIDE "UNIFORM LAWS ON THE SUBJECT OF BANKRUPTCIES THROUGHOUT THE UNITED STATES."

Wherein consider that the act enacted and gave effect to, as a part of the statutes of the United States, the different and often conflicting statutes of the several States and the decisions of the several State courts interpreting them, as set forth at length in the amended declaration upon these subjects: (*a*) The existing and subsequent statutes of the several States in the matter of exemptions, and whereby, by the accident of place of residence or by designedly changing his residence, the debtor may change the nature and increase

the amount of his property withheld from creditors and the trustee (sec. 6); (*b*) The different rules of decision of the several State courts of the *situs* of the debtor's property are made parts of the act, and thereby what property of the debtor may or may not be assets for creditors varies according to locality (sec. 67); (*c*) The several different and conflicting statutes of frauds of the several States and their registry acts, and their rules of decision thereon, whereby as bankruptcy proceedings are intended primarily to protect creditors from the fraud of their debtors, whether or not such conveyances are void would depend upon the local law and jurisprudence of the State of the *situs* of the property (sec. 67, id. 23); (*d*) The different State statutes on the subject of dower and community property; (*e*) The different rules of evidence and as to competency of witnesses in the several States, and the numerous other instances set forth specifically in the amended declaration, unnecessary to specify here and set forth in Appendix A hereto.

The basic principle of the act is that if there is provided for distribution among creditors whatever of the debtor's property is recoverable by creditors under the local State laws enacted and to be enacted and the decisions of the courts, in the State courts of the *domicile* of the debtor; or, where the *situs* of the debtor's property is other than his domicile, in the State courts of the *situs* of the property, there is provided "uniform laws on the subject of bankruptcies throughout the United States."

If this principle is constitutionally unsound the act must fall.

The delegation to Congress being "to establish * * *

uniform laws on the subject of bankruptcies *throughout the United States*," the question is whether by such an act Congress establishes "*uniform laws* * * * *throughout the United States*."

It is manifest that in themselves such laws are not uniform. There is no homestead exemption in Rhode Island and no limit to its value in Texas. The provisions of the exemption laws of Mississippi, where the debtor resided until after judgment, and of Tennessee, differ essentially. Under the act a debtor could contract debts in Rhode Island, and then move his residence to Texas for six months or the greater part thereof prior to filing his petition and invest the $1,000,000 in a homestead, and his creditors could not reach it. If the exemption arises under a State statute enacted *after* the contraction of the debts, it would be covered by such statute under the express terms of the act.

The statutes of frauds of the several States differ essentially and materially, both as to what conveyances are void as to creditors and as to what classes of creditors, whether prior or subsequent or both, or general creditors or creditors with a lien, can avoid them.

In Mississippi fraudulent conveyances can be vacated by creditors without judgment or lien obtained (Code 1892, sec. 503). The rule in the absence of statute is the contrary. Fraudulent conveyances are good against subsequent creditors unless "made with intent to defraud them" (Code 1892, sec. 4228). Parol trusts in land are void under the statute (*id.*, sec. 4230,) *aliter* in some States. The ownership of goods is conclusively presumed to be in him who transacts the business in the absence of a sign showing the agency (*id.*, sec. 4234); and yet the merchant could carry his stock

of goods across the imaginary line between Mississippi and Tennessee and it would *not* constitute assets for creditors.

The right of dower as at common law exists in Virginia, and under modifications it exists in many States, but it does not exist in Mississippi.

These are some of the many instances illustrative of differences, and they could be multiplied innumerably.

These illustrations show that the estate of the debtor in bankruptcy under State laws could not be measured by the same rules, and that what would be assets in one would not be assets in another State.

This court has never construed the meaning of these words in this statute, but its decisions on like provisions and cognate subjects under the Constitution are adverse to the principle of this act.

The decisions of many of the courts of the United States of inferior jurisdiction have supported this principle under the prior acts, but throughout these decisions runs the constraining influences of the grave consequences that may flow from the declaration of its invalidity, and the presumption of its constitutionality, and the deference to Congress, and to what might be the opinion of this court, the final judge of all such questions. As said *In re Kean and White*, 8 N. B. R., 367:

> "But if the case had been stronger against the law, it would scarcely become me in my inferior position in the Federal judiciary to show such want of deference for a high co-ordinate department as to pronounce their act a violation of the Constitution."

See also *Bank v. Wilborn*, 6 Ark., 35; *Hasting v. Fowler*, 2 Ind., 216; *Reed v. Vaughan*, 15 Mo., 137; *Keene v. Mould*, 16 Ohio, 12.

The words are to *establish uniform* laws—*una forma*—one form—"having always the same form, manner or degree; not varying or variable; unchanging; consistent; equable; homogeneous" (*Webster's Internat. Dic.*).

This delegation of power to Congress was to protect the creditors of the various States from the discriminating insolvency laws of the several States. Its subject-matter pertained to commerce between the States. Up to the time of the promulgation of the Constitution, by the uniform course of English legislation, bankruptcy proceedings had been confined to traders and to trade and had been remedial agencies in the hands of creditors. The acts of 1800 and 1841 followed this precedent and were confined to traders and those engaged in commerce.

The introduction of this provision into the convention of 1787 was in its relation to and as a part of the powers to be exercised over commerce.

> "It was moved and seconded to commit the sixteenth article, together with the following proposition, 'To establish uniform laws on the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange,' which passed' (1 *Elliott's Deb.*, 302).

The committee reported back this phrase in the identical words of submission (1 *Ell. Deb.*, 310). In its collocation in the Constitution it is found with the commercial clauses thereof and between "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" and "to coin money, regulate the value thereof, and of foreign coin and to fix the standard of weights and measures;" and it is followed by the commercial provisions

granting power to punish for counterfeiting the coin and securities of the United States, to establish post-roads, and the power over patents and copyrights.

It thus clearly appears that this provision was designed to pertain to the general commerce clauses of the Constitution.

Ex antecedentibus et consequentibus fit optima interpretatio.

There are seven pre-eminently commercial provisions of the Constitution: 1, interstate and general commerce; 2, admiralty; 3, patents; 4, bankruptcies; 5, coinage; 6, weights and measures; 7, postal affairs.

Each and every of these powers were delegated to Congress because it was contrary to the general welfare of the Union that each State should have any power to discriminate in those matters of vital concern to the whole people.

The rule of uniformity prevails in the statutes applicable to every one of these matters, *whether required by the Constitution or not.*

In *Workman v. New York*, 179 U. S., 552, the reason of the rule of uniformity is clearly stated, and it was held that matters of admiralty, jurisdiction of which was committed exclusively to the Federal courts, are not controlled by the local law of the State as at law and in equity, but the rules of decision are original in and for that court. Says the court:

> "The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief to every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by the conflicting decisions of the

State courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be one thing in one State and another in another; one thing in one part of the United States and a different thing in some other part. As the power to change State laws or State decisions rests with the State authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever-abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a maritime law is at once patent. And the principle by which the maritime law would be thus in fact practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal Government" (p. 558). * * * "That we have a maritime law of our own operative throughout the United States cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction." * * * "It assumes that the meaning of the phrase admiralty and maritime jurisdiction was well understood." * * * "One thing, however, is unquestionable, the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution

> aimed on all subjects of a commercial character affecting the intercourse of the States with each other and with foreign States" (p. 561–'2).

The same rule of uniformity exists in interstate and general commercial laws.

Speaking of the nature of the uniformity required, it was said:

> "Commercial law is a system of jurisprudence acknowledged by all maritime nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world" (p. 32). * * * "Uniformity of decision is a matter of great public convenience and universal necessity, acknowledged by all commercial nations. Should this court adopt a principle of decision which when carried into effect would establish as many different rules for the determination of the controversies as there are States in the Union, it would be justly considered a public calamity" (*per Clifford, J., in Brooklyn, &c., Railroad Co. v. National Bank of Republic*, 102 U. S., 58).

The courts of the United States do not follow the rules of decision of the local State courts upon questions of general commercial law, but they follow the general rules of decision of the commercial nations of the world (*Brooklyn R. R. Co. v. National Bank of Republic*, 102 U. S., 14; *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet., 495; *Oatis v. First Nat. Bank*, 100 U. S., 239; *Hartford Ins. Co. v. Chic., &c., R'y Co.*, 175 U. S., 100; *Swift v. Tyson*, 16 Pet., 1).

The same rule of uniformity, of necessity, must exist under each of the other commerce clauses of the Constitution.

These commerce clauses speak from the standpoint of the individual citizens of the several States, *inter sese*, and not in relation to the governmental functions of the Government. They are powers granted to protect the individual citizens of one State from discriminating legislation by other States. The uniformity sought is a common standard of law whereby each citizen of the Union might have the same rights as every other citizen in every other State whenever Congress undertook to prescribe a right or to afford a remedy.

Congress was not fettered by the limitation of the contract clause of the Constitution upon its powers. It could impair the obligation of a contract by legislation. In commerce Congress stands supreme. It can enact that a bankrupt law shall apply to and discharge past as well as future contracts. It can prescribe what property shall be allotted to the bankrupt as exempt, regardless of whether a creditor's right was under a contract prior or subsequent to the passage of the act. It can declare what conveyances shall be invalid as fraudulent in bankruptcy proceedings and what shall constitute assets of the bankrupt for distribution. In short, the power of Congress in enacting a system of bankruptcy is supreme, and, if the debtor and his creditors have due notice of the proceedings provided for, its remedial power is practically unlimited.

The history of the delegation of this power shows that it was given with direct reference to like powers exercised by Parliament, and the act of 1800 was substantially the form of the then English acts. Parliament provided the whole system, and, as there were no constitutional restrictions upon it or the exercise of its jurisdiction, no questions of limitation of power could arise. It was never intended that the differ-

ing and conflicting legislation of the several States should ever become a part of the exercise of this power. It was delegated to Congress because of the extent of its power over commerce and because Congress alone could be entrusted with this dominion over the property of the people as a people of the whole Union.

In the recent case of *Knowlton v. Moore*, 178 U. S., 85–106, the court, through Mr. Justice White, makes a searching analysis of the meaning of the words "uniform throughout the United States" in article I, section 8, whereby it is declared:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

It will be noted that this section of the Constitution has reference to governmental functions in the imposition of taxes, duties, imposts, and excises for the purposes of revenue.

The effort was made to so interpret this section as that it should be the equivalent of the expression, Taxation shall be equal and uniform, as used in State constitutions.

The court, upon an exhaustive review of all the precedents, legal and legislative, in respect to duties, imposts, and excises, held that this phrase in this section meant that duties, imposts, and excises should be "*geographically*" *uniform*—that is, they should be imposed on the same articles and at the same rate, whether *ad valorem* or specific, and to operate generally throughout the United States.

The same rule was followed in *Fairbanks v. U. S.*, 181 U. S., 283.

In *Leidigh Car Co. v. Stengel*, 95 Fed., 646, 647, it was held that the word *uniform* in the act of 1898, *as to persons*, means geographical, not personal, uniformity; that is, applicable to all members of the community. It is difficult to understand how the act could be geographically uniform and not be personally uniform. It may not apply to all members of the community, but to the *class* to which it has application it must apply uniformly. The court in this case follows the *dictum* of Marshall, C. J., in *Sturges v. Crowninshield*, *supra*, in stating that while at the adoption of the Constitution bankruptcy applied only to traders, it was discretionary with Congress to enlarge the class, thereby omitting to give effect to the principle that if, when the Constitution was adopted, it was intended that bankruptcy should apply to traders only, that Congress could not change the meaning of the words of the Constitution. *In re Painter*, 1 Q. B. Div. (1895), 85, was cited as authority for the power of Congress to enlarge the class, seemingly unmindful of the difference between the constitutional restrictions on the powers of Congress and the untrammeled powers of Parliament.

It is difficult to conceive how the act of 1898 as to property and creditors' rights could be a "geographically" uniform law and "to operate generally" throughout the United States. Its whole operation is specific and under special local laws and decisions in each of the States. It does not pretend to operate in the same way and to the same extent generally throughout the Union.

By giving effect to the several State exemption laws Con-

gress has provided that a citizen of the United States and within a certain part of the United States, as, for example, within the boundaries of the State of Texas, as to creditors, shall have an unlimited homestead exemption in bankruptcy, while a citizen in the boundaries of Rhode Island shall have no exemption.

The only other time that the word "uniform" is used in the Constitution is in article I, section 8, whereby—

> "The Congress shall have power to enact uniform laws on the subject of naturalization."

The power here granted has been exercised by enacting uniform laws applicable in and to every person alike in every State, and therein is an exemplification of the true intent and meaning of the phrase "uniform laws" in the Constitution.

The meaning of a word in one part of an instrument is one of the most satisfactory tests of its definition in other parts of the same instrument (Miller, J., in *Woodruff v. Parham*, 8 Wall., 131).

> "*Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur.*"

Congress interpreted the Constitution to provide that a "*uniform system*" should be enacted. While many of the framers of the Constitution were still alive, and in legislation almost contemporaneously with the promulgation of the Constitution, the act of 1800 (2 Stat. at Large, 19) was passed, and by it specific exemptions were provided independent of and superior to the exemption laws of the several States. The same interpretation was followed by the act of

1841 in regard to exemptions (5 Stat. at Large, 443). By these acts uniform laws were enacted on the subject of exemptions.

> "*Contemporanea expositio est optima et fortissima in lege.*"

Chief Justice Marshall in *Sturges v. Crowninshield*, 4 Wheat., 193, said on this subject:

> "Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is, perhaps, incompatible with State legislation, on that part of the subject to which the acts of Congress may extend."

That the power exists in Congress as a part of uniform laws on the subject of bankruptcies to prescribe what the exemptions shall be under the act, and that this power is in no way fettered by what may or may not be the State exemption laws is too clear for disputation.

The State exemption laws are founded on the same principles as support bankruptcy and insolvent laws. They differ in degree and application only. They both provide protection to the debtor against financial disaster and the pursuit of his creditors (*Gregg v. Bostwick*, 33 Cal., 228; *Wood v. Wheeler*, 7 Texas, 22; *Hinds v. Morgan*, 75 Miss., 517; *Moseley v. Anderson*, 40 Miss., 54).

Every act of Congress on this subject has purported to furnish a *uniform system* of bankruptcy. Such was the purpose of the delegation of the power. A "uniform system'

cannot be predicated of the commingling of the conflicting elements of State statutes by this act.

The act of 1867, section 14, contained in the main an independent legislative creation of exemptions, and superadded were these exemptions:

> "And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four."

The act of 1898, section 6, provides:

> "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The exemptions *created* by Congress by the act of 1867 were uniform throughout the United States, and the non-uniformity only arose exceptionally in the adoption of State statutes, and hence the non-uniform provision never became controlling.

Several cases arose in Federal courts of inferior jurisdiction upon this *non-uniform* clause of the act of 1867, but they all followed the case of *In re Beckerford*, 4 Nat. B. R., 203, before Mr. Justice Miller and Krekel, J., in the circuit court. The court, *per* Krekel, J., held the statute uniform in this aspect, saying:

> "So far as the distribution of the bankrupt's assets—the point under consideration—the law is uniform. When viewed with reference to the State exemption laws, there is uniformity which on reflection readily suggests itself. Though the States may vary in the extent of their exemptions, yet *what remains* the bankrupt law distributes equally among creditors."

This opinion also declares:

> "But the power to abrogate State exemption laws has never been claimed for Congress; on the contrary, such laws have been upheld and declared constitutional, when not applied to obligations incurred prior to the passage of the law."

These quotations show that the questions involved were not supported by citation of authority, nor even subjected to an ultimate analysis. If the decision is as erroneous throughout as it is in declaring that Congress had no power, by the passage of bankruptcy laws, to disregard State exemption laws and to designate what property shall be exempt to the debtor under the act, it is demonstrably unsound.

The question there involved was not whether the distribution of the residuum of the estate was by uniform rules, but whether the residuum itself was produced by the operation of uniform rules. If by the adoption of local laws Congress had excepted property by non-uniform rules, the violation would inhere in the exception and not in the distribution of the residuum.

The purpose of the delegation of the power to Congress was to have its exercise superior to the trammels of the protective legislation of the States. If the States are to control by their local laws what amount of property shall be ex-

cepted from distribution under Federal laws, under the remedy provided by bankruptcy, it is indirectly and to that extent giving them power to declare what property shall constitute the estate for creditors under these acts of Congress. It was never intended that Congress should have power to distribute among creditors only such parts of the debtor's estate as was subject to creditor's demands under local laws. The extraordinary remedy in bankruptcy was devised and its application and limitations were confided to Congress because it alone had power to make it efficiently protective. If local laws are the measures of the power, the very object of its being is destroyed.

If this was the limit of the power, it is flagrantly transcended by the act of 1898 in making the exemption laws of the State where the bankrupt may have resided the greater part of the six months next preceding the date of the filing of his petition apply, without regard to when the debt was contracted, and when the exemption act was enacted, and whether before or since the enactment of the act of 1898. Under the Constitution the States have no power to increase the exemption after the contraction of the debt, because it impairs the obligation of the creditor's contract (*Johnson v. Fletcher*, 54 Miss., 628, 629; *Gunn v. Berry*, 15 Wall., 610). If, therefore, the debtor asserted a right to increased exemptions in a State court under a subsequent State statute, it would be denied because of the contract clause of the Constitution; but if the acts of 1867 and 1898, under their *independent* creative exemption clauses, increased the exemption existent under the State law, it would be a valid claim under the legislative powers of Congress. The same reasoning applies under the acts of 1800 and 1841. There no

notice whatever was taken of what property the creditors could subject under the State laws. The amount of the exemption was fixed arbitrarily, but uniformly, throughout the United States by Congress. The same power was exercised by Congress under the first clause of the act of 1867. The arbitrary date of 1864 is fixed by the act of 1867 as the time when the State exemptions adopted were to have been in force, and this regardless of when the debts were contracted or the date of the passage of the State statute existing when the claim to exemption was propounded.

It is not, therefore, a sound rule of interpretation of the meaning of "uniformity" to declare that whatever under the laws of the several States creditors suing in those States could recover is the measure of the rights of creditors under the power of Congress on the subject of bankruptcies.

The same reasoning applies to the embodiment of the conflicting and varying statutes of frauds of the several States. It was never intended that a debtor should contract debts in Mississippi and move his personalty to Tennessee, and then, under an act of Congress, find protection from creditors because of the adoption by Congress of the Tennessee statute. Should not the principle asserted in *Workman v. New York*, 179 U. S., *supra*, and in *Brooklyn R. R. Co. v. Nat. Bank*, 102 U. S., *supra*, where no constitutional rule of uniformity was required, be the basis upon which Congress should obey the mandate of the Constitution on the subject of bankruptcies?

In re Beckerford, supra, was followed; *In re Jordan*, 8 N. B. R., 180, and *In re Kean v. White, id.*, 367, overruled by *In re Geo. Dillard*, 9 N. B. R., 8.

In re Deckert, 10 N. B. R., 1, while seemingly approving

In re Beckerford, supra, really asserts doctrines inconsistent with its reasoning. Chief Justice Waite there says, page 4:

> "A bankrupt law, therefore, to be constitutional must be uniform. Whatever rules it prescribes for one, it must for all. It must be uniform in its operations not only within a State, but within and among all the States. If it provides that property exempt from execution shall be exempt from assignment in one State, it must in all. If it specially sets apart for the use of the bankrupt, certain property, or certain amounts of property in one State, without regard to exemption laws, it must do the same in all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other place within which it is to have effect."

The principle for which we contend is illustrated by the decisions upon the amendment to the act of 1867 by the act of March 3, 1873, made necessary by the amendment of the exemption laws by the State of Virginia, and which was held to be unconstitutional because not uniform (*In re Deckert*, 10 N. B. R., 1, *supra*; *In re Duerson*, 13 N. B. R., 183; *In re Geo. Dillard*, 9 N. B. R., 8, *supra*).

The "system" of "uniform laws" contemplated by the Constitution was one arising with Congress itself and under the exercise of its delegated powers. A "system" in which each creditor in each State shall have the same rights as each creditor in every other State. In which the relation of the creditor's debts to the debtor's property shall be a mathematical constant throughout the United States. If the debtor is to have the benefit of a discharge from the obligation of the debt, upon surrender of his property in

possession, that discharge should be awarded only upon the grounds of uniformity in the *quantum* and *character* of the estate to be distributed among creditors.

It is incongruous to hold that the creditors under an act of Congress should be limited in participation to what they could recover under State laws and State remedies when the power to be exercised is vested in Congress alone, namely, the power of absolution from the obligation of the debt. By this act *State statutes* and *State remedies* only are provided for the *creditor—Federal powers* are to be exercised and *Federal benefits* are to be conferred upon the *debtor* by his discharge.

2. (*b.*) UNDER THE ACT OF 1898 CERTAIN LEGISLATIVE POWERS ARE DELEGATED BY THE CONGRESS TO THE STATES CONTRARY TO THE CONSTITUTION.

By section 6 it is provided:

> "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws *in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.*"

By section 3 (*b*) (1) the statutes of registry of the several States are incorporated into this act, and power is given to the States to alter or repeal them at will, and thus materially to change the bankrupt law; and the same power is granted under section 8 (*a*) as to dower and allowances, and under section 21 (*a*) as to the competency of witnesses, and under section 62 (*a*) (5) as to costs incurred in a suit as well as to interest, and under section 64 (*b*) (5) as to the priority of payment, and under section 70 (*e*) as to the statutes of voluntary

and fraudulent conveyances. These several State laws are incorporated into the act in numerous other places by other sections.

In construing these local statutes the Federal courts follow the adjudications of the State courts as to their interpretation (*In re Steel*, 107 Fed., 687).

Under these several provisions the legislatures of the several States are invested by Congress with *plenary legislative power* over subjects of which Congress has exclusive jurisdiction when it has exercised it, and the State courts have power to give effect to this act according to their construction of their local statutes, constituting part of the act (*Sturges v. Crowninshield*, 4 Wheat., 122; *Ogden v. Saunders*, 12 Wheat., 213).

It is violative of the Constitution for Congress to thus abdicate its sovereignty. As aptly said by Judge Cooley:

> "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust" (*Cooley on Cons. Lim.* (5th ed.), 139).

In *Wayman v. Southard*, 10 Wheat. (1825), 42, Chief Justice Marshall says:

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, power which is strictly and exclusively legislative." * * * "The State assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the Constitution vests in Congress and cannot receive it by delegation" (*id.*, 48).

In *R. R. Co. v. R. R. Co.*, 10 Wall. (1869), 50, it is said:

> "Power to make laws is vested in the legislature, under the constitution of the State, and it is very doubtful whether the legislative department can delegate to any other body or authority the power to grant such a franchise, as the exercise of that power involves a high trust created and conferred for the benefit of those who granted it, and as the trust is confided to the legislature it must remain where it is vested until the constitution of the State is changed."

In *Stoutenburgh v. Hennick*, 129 U. S. (1888), 141, it was held that the act of the Legislative Assembly of the District of Columbia of August 23, 1871, as amended June 20, 1872 relating to license taxes on persons engaged in trade, business, or profession within the District, was intended to be a regulation of a purely municipal character; but, nevertheless, the provision in clause 3 of section 21, which required commercial agents engaged in offering merchandise for sale by sample to take out and pay for such a license, is a *regulation* of *interstate commerce*, so far as applicable to persons soliciting the sale of goods on behalf of individuals or per-

sons doing business outside of the District, *and it was not within the constitutional power of Congress to delegate to that legislature authority a enact a clause with such a provision*, nor did it in fact do so in a grant of power for municipal purposes.

To the same effect are *In re Rohrer*, 140 U. S., 545; 6 *Am. & Eng. Enc. Law* (2d ed.), 1027; *Field v. Clark*, 143 U. S., 692, wherein the court says:

> "That Congress cannot delegate legislative powers to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

In its essential features this act provides that by force of the legislative power of Congress the debtor is adjudged bankrupt and is discharged from his debts. This is an exercise of Federal legislative functions. After provision for these two extremes of the proceeding the independent Federal legislative functions cease, and the whole body of the act, so far as the rights and remedies of creditors are concerned, is dependent upon the exercise, in the past or in the future, of the legislative powers of the several States, in that the States have power by legislation, past or future, to fix the nature, amount, and value of the estate that shall, as non-exempt property, pass to the trustee for distribution, and thereby to expressly prescribe what shall constitute the estate for creditors, and also what conveyances shall be declared fraudulent as to creditors, and what shall be the effect of the registry acts thereon, and who shall be entitled to priority of liens and payment. To summarize, Congress delegated to the State legislatures the whole power to pre-

scribe and regulate the *quantum* of the bankrupt's estate. Mississippi could adopt a subsequent, unlimited homestead exemption law, and thereby deprive creditors of all of the bankrupt's estate. It may repeal its statute of frauds declaring parol trusts in land void and its other phases, and thereby validate, so far as the bankrupt act is concerned, present invalid conveyances. Thus this act of Congress in form would or not be effective according to the will of the several State legislatures. With the States would rest the legislative power over this subject, contrary to the delegation to Congress.

This act consists of the different and conflicting existing State laws and of such as may be hereafter enacted by the States on these several subjects, with diverse and often contradictory judicial interpretations thereof, compressed by Congress into an indistinguishable mass, with power granted by Congress to the States to modify, alter, or repeal them at will, and as thus modified, altered, or repealed they are to become by State enactment *ipso facto* parts of an act of Congress.

The early interstate jealousies were too great to suppose that any State would have confided these powers, through Congress as a conduit, to a rival State. Congress cannot abdicate the trust by a redelegation to the several States of that power which was intrusted to its judgment, wisdom, and patriotism.

2. (*c*.) THE PHRASE "ON THE SUBJECT OF BANKRUPTCIES," IN ARTICLE I, SECTION 8, PARAGRAPH 4, OF THE CONSTITUTION OF THE UNITED STATES WAS CONFINED TO A PROCEEDING AGAINST TRADERS, ET ID OMNE GENUS, IN INVITUM, AND DID NOT EMBRACE VOLUNTARY PROCEEDINGS BY ANY CLASS OF PERSONS, AND THE ACT OF 1898 VIOLATES THE CONSTITUTION, IN THAT IT PROVIDES THAT OTHER THAN TRADERS MAY BE ADJUDGED BANKRUPTS AND ON THEIR VOLUNTARY PETITIONS.

To ascertain the meaning of the phrase "on the subject of bankruptcies" as used in the Constitution, the source of its origin must be traced and resort must be had to its signification in English jurisprudence at the time of the adoption of the Constitution in 1787. At that time the laws and jurisprudence of England were "the law of the land" of the several States. The use of a word was marked by its legal derivation in nature, extent, and limitation.

The then legally accepted definition in English jurisprudence of a "bankrupt law" was an act by which honest creditors could compel fraudulent debtors, *who were traders*, to surrender all of their property to pay ratably all of their just debts, and the accepted definition of an "insolvent" law was an act exclusively for the benefit of the debtors, whereby by their voluntary act they could surrender their property and be released from imprisonment for debt. This distinction was clear and settled. In the common law neither proceeding was known. There was then no imprisonment for debt. Insolvency proceedings existed long prior to any statute on bankruptcy.

The remedy of imprisonment in actions of debt and case

first originated in the statute of 1267 and culminated in 19 Henry 7, chapter 9. These statutes produced their logical results. The jails were filled to overflowing with debtors, and those imprisoned ceased to be a benefit to themselves and became a burden to the community. So congested had the jails and prisons become that the statute of 8 Elizabeth, chapter 2, attempting to remedy it, failed of effect; so Queen Elizabeth issued the proclamation of April 20, 1585, authorizing certain commissioners to compound controversies. This edict continued in force until her death. James I, aided by the counsel of Lord Bacon, issued a similar, but enlarged, commission, in which the term *insolvency* is expressly mentioned and *its nature described*. Charles I did likewise, and then the Republican Parliament passed the first regular *insolvent* law, meant to supersede and supply the place of these commissions. Next in order came the first great "insolvent act" of 22 and 23 Charles II, chapter 20, which has been the model of all that follow, its provisions and language having been copied by subsequent Parliaments and by our colonial legislatures with almost unvarying exactness. There have been about forty of these acts passed from time to time in England, until at length a *regular system of insolvency was established*. A regular system of courts possessing a jurisdiction clearly and sharply differing from the jurisdiction in bankruptcy decided cases of *insolvency* in one room in Guildhall while commissioners of *bankruptcy* were deciding causes in another.

The development of a system of *bankruptcy* was evolved in this mode. The first statute (34 Hen. 8) on this subject was passed in 1542. While this act does not expressly limit its provisions to merchants and traders, the state of society

at that far-distant day must be recalled. The counties of England were held by great lords. The greater part of their population were their villeins. Commerce hardly existed. Contracts were rare save among merchants. Indeed, Lord Coke (4 Inst., 277) states that from the very first these laws were against fraudulent merchants, and at that time it was well understood that these three elements must be present in a bankruptcy act: (1) A proceeding *in invitum by a creditor;* (2) against his merchant or trader debtor; (3) on account of some fraudulent practices of the latter.

The next controlling statute of bankruptcy is 13 Elizabeth, chapter 7, wherein it is provided:

> "That if any *merchant*, or other *person using or exercising the trade* of *merchandise* by way of *bargaining, exchange, re-exchange, bartry, chevisance* or otherwise, *in gross* or *by retail* or seeking his or her *trade* of living *by buying and selling*" (and after enumerating various covinous practices as constituting acts of bankruptcy) declares that "such person shall be *reputed, deemed*, and *taken* for a bankrupt;"

and that he shall be so declared by a proceeding *in invitum*.

Contracts were then becoming more general, and they were not confined exclusively to merchants and traders, as formerly, and hence it is found—what we might have anticipated—that the statute expressly declares that merchants and traders alone shall come within its provisions and receive its benefits (*Sackett v. Andross*, 5 Hill, 345).

The next statute of bankruptcy is James I, chapter 15, and it is substantially the same as 13 Elizabeth, *supra*, and it declares:

> "For that *frauds* and *deceits, as new diseases*, daily increase among such as live by buying and selling to the *hindrance* of traffick and mutual commerce, and to the general hurt of the realm, * * * as is meet in such cases of deceit, to prevent the deceitful actions of the bankrupt."

The statute of 13 and 14 Charles II, chapter 24, illustrates very forcibly the limitations. Its preamble is:

> "Whereas divers noblemen, gentlemen and persons of quality, *no way bred up to trade* or *merchandize*, do oftentimes put in great stock of money into certain royal companies," etc.

And then enacts:

> "For or by reason only of the receiving and taking such fish, goods and merchandize, or selling for money, or exchanging the same again, be not adjudged, taken or esteemed or reputed a *merchant* or *trader* within any statute or statutes for bankruptcy, or liable to the same."

That these laws apply to this commercial class only is emphasized by Parliament vacating a judgment in bankruptcy against Sir John Wolftenholme rendered on these grounds.

The next statute of bankruptcy, 19 George II, chapter 32 (1746), provides:

> "Whereas many persons within the description of and liable to the statutes concerning bankrupts, frequently commit secret acts of bankruptcy, *unknown to their creditors*, and other *persons*, with whom in the *course* of *trade*, they have dealings and transactions, and after the committing thereof, continue to appear

> publickly and carry on their *trade* and dealings, by *buying* and *selling* of *goods* and *merchandize* as *drawing, accepting* and negotiating bills of exchange and pay and receive money on account thereof in the usual way of trades," * * * "and whereas merchants and other traders," etc.

And to the same effect is 5 George II, chapter 30.

There are a few more of these statutes, but they all proclaim with one accord that the above-recited three essential elements must be present in a bankruptcy proceeding.

Therefore a *bankrupt* law was a remedy in the hands of the creditor, whereby he was enabled to protect himself against fraudulent practices on the part of his commercial debtor by forcing him to surrender his property to trustees, who are to apportion its proceeds among his creditors. This was the entire scope of the English bankrupt acts. This meaning of this term was settled at the time of the adoption of the Constitution.

Lord Coke said (4 Ins., 277):

> "In former times as the name of a bankrupt, so was the offence itself (as has been said) a stranger to an Englishman who of all others' nations was freest of bankruptcy and the first statute we find against this crime, was intended against strangers viz: against Lombards, who after they had made obligations to their creditors, suddenly escaped out of the realm without any agreement made with their creditors. It was therefore enacted that if any merchant of the company acknowledged himself bound in that manner, that then the company shall answer the debt; so that another merchant which is not of the company shall not thereby be grieved or impeached; neither do we find either any complaint in Parliament, or act

> of Parliament made against any English bankrupt made until the 34 years of H. 8, when the English *merchant* had rioted in three kinds of costliness, viz: costly building, costly diet, and costly apparel accompanied with neglect of his trade and servants and thereby consumed his wealth."

Now let us turn to that greatest expositor of the common law, Blackstone, whose commentaries were on the desk of nearly every member of the Constitutional Convention and with which every lawyer was familiar (*Fed.*, No. 84; *Mad. Pap.*, 1450). He divides this subject into four heads: "1. *Who* may become a bankrupt; 2. What *acts* make a bankrupt; 3. The *proceedings* on a commission of bankruptcy; 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy" (2 *Blacks. Com.*, p. 471).

> 1. "A bankrupt was before defined to be 'a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.' He was formerly considered merely in the light of a criminal or offender and in this spirit we are told by Sir Edward Coke that we have fetched as well the name as the wickedness of bankrupts from foreign nations. But at present the laws of bankruptcy are considered as law calculated for the benefit of trades, and founded on the principles of humanity as well as justice; and to that end they confer some privileges not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without fraudulent concealment; on the debtor, by exempting him from the rigour of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he had nothing to satisfy the debt;

whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which *men in trade* are liable, has given them the liberty of their persons and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors. * * *

"But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore, they allow the benefit of the laws of bankruptcy to none but actual *traders;* since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts without any fault of their own. If persons in other situations of life run in debt without power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes; for the law holds it to be an unjustifiable practice, for any person but a *trader* to incumber himself with debts of any considerable value. If a gentleman or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditors: and if, at such time he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides; the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his mis-

fortune and not his fault. To the misfortunes, therefore, of debtors, the law has given a compassionate remedy, but denied it to their faults; since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared that no one shall be capable of being made a bankrupt, but only a *trader;* nor capable of receiving the full benefit of the statutes, but only an *industrious* trader."

"In the interpretation of these several statutes, it hath been held that buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelihood thereby."

For what acts a merchant may be forced into bankruptcy (pp. 477, 478), and how he may be made a bankrupt and by whom, is enumerated in 2 *Blacks. Com.*, 480.

These words as used in the Constitution had the same meaning as they had in the laws of England.

In 2 Kent's Commentaries, 389, the learned chancellor says:

"The Constitution of the United States gave to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. Bankruptcy in the English law has, by long and settled usage, received an appropriate meaning, and has been considered to be applicable only to unfortunate traders, or persons who get their livelihood by buying and selling for gain, and who do certain acts which afford evidence of an intention to avoid payment of their debts" (citing 2 Bl. Com.).

> "In this respect there is a marked difference in general between the bankrupt and insolvent laws, for while the bankrupt may be discharged from his debts, the insolvent debtor is usually only discharged from imprisonment. But the line of partition between bankrupt and insolvent laws is not so distinctly marked as to enable any person to say, with positive precision what belongs exclusively to one and not to the other class of laws. It is difficult to discriminate with accuracy between bankrupt and insolvent laws; and therefore, a bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law. The legislature of the Union possesses the power of enacting bankrupt laws; and those of the States power of enacting insolvent laws; a State has likewise authority to pass a bankrupt law."

From this it will be seen that there was the same well-known distinction made as formerly obtained. The part of the quotation about the "insolvent laws containing provisions common to the bankrupt law," and *vice versa*, is based on *Sturges v. Crowninshield*, 4 Wheat., 122.

Though Chancellor Kent's mind was never directly called to the question here at issue, as Congress at that time had never attempted to pass any such sweeping act as the present one, nevertheless his opinion preserves the distinction that existed between bankrupt and insolvent laws. He says:

> "The legislature of the Union possesses the power of enacting bankrupt laws: and those of the States the power of enacting insolvent laws; a State has likewise authority to pass a bankrupt law."

There is but a single paragraph in the *Federalist* (No. 42) on this subject, and it is there said:

> "The power of establishing uniform laws of bankruptcy is so *intimately* connected with the regulation of *commerce*, and will prevent *so many frauds* where the *parties* or their *property* may lie, or be removed into *different States*, that the expediency of it seems not likely to be drawn in question."

Here we have accurately defined by Mr. Madison the reason why the States should cede to Congress this power, as well as the intended limitation upon the power. It did not extend to the whole subject of insolvency, but embraced only that portion which was so intimately connected with commerce—*i. e.*, bankruptcy—and it was not given for the benefit of the debtors, but for the prevention of "frauds." Here we have concisely embodied the three most salient features of a bankrupt law, and have a "warranty" to the States that this was the extent of the power.

By construing this section thus we see it entirely comports with the idea, paramount in the Constitution, of vesting in the Federal Government the entire control of all matters which related to commerce (1 Ell. Deb., 336), and in this view this section would be the complement of the clause that confers jurisdiction on Congress to regulate commerce between the several States, and this would be in harmony with the entire instrument.

> "If the power does not refer to any system of laws but is understood as speaking of insolvency in the abstract, then Congress need not require the debtor to go through the forms of asking a discharge; but may at once absolve him from his obligation, and tell

the creditor he is a creditor no longer. There need be no surrender of the debtor's estate." Brownson, J. (*Sackett v. Andross, supra*).

"I do not see how it is possible to deny that these consequences may follow, if the principles asserted by this law can be defended. It is no answer to say that such powers will not be exercised. The question is whether they have been granted. I think not. Every one knows that the States were jealous of their rights, and that nothing pertaining to their sovereignty was yielded to the Federal Government unless the grant was either essential to the existence and efficiency of that Government, or the well-being of the whole people; and in all cases the utmost caution was observed in making the grant. Powers were not bestowed on the assumption that they could not be used. There were good reasons for giving Congress the power over bankruptcy, as that term had always before been understood; but not for going further and including the whole relation of debtor and creditor."

"Merchants and commercial men are under the necessity of using credit as well as capital, and their affairs are not confined to any particular district, but spread over the whole country. No single State could either secure to them the just fruits of their enterprise and skill, or grant them adequate relief in case their hazardous employments should prove unsuccessful. Hence the necessity for a national bankrupt law. But in the ordinary dealings between neighbor and neighbor who are not engaged in the business of buying and selling as a livelihood, there could be no occasion for calling in the Federal Government. And, besides, the condition and wants of the great mass of the people could not be so well understood by Congress as by the local legislation.

> These considerations render it highly improbable that the States have surrendered the powers which Congress has attempted to exercise, and they are entitled to great weight in fixing the true interpretation of the grant" (*id.*, 353).

The recognized difference between the system of bankruptcy and of insolvency laws, and the difficulty of the application of the two systems—bankruptcy and insolvency—growing out of the inherent powers of the States to enact bankruptcy and insolvency laws, and the delegation to Congress to enact bankruptcy laws, was adverted to by Chief Justice Marshall in *Sturges v. Crowninshield, supra* (194–'5–'6), wherein he says:

> "Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of Congress authorize a commission of bankruptcy to issue on the application of the debtor, a court would scarcely be warranted in saying that the law was unconstitutional and the commission a nullity, * * * although the two systems have existed apart from each other there is such a connection between them as to render it difficult to say how far they may be blended together. The bankrupt law is said to grow out of the exigencies of commerce and to be solely applicable to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion."
>
> "This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead

> to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious that much inconvenience would result from that construction of the Constitution which should deny to the State legislatures the power of acting on this subject, in consequence of the grant to Congress. * * * It does not appear to be a violent construction of the Constitution and it is certainly a convenient one, to consider the power of the State, as existing over such cases as the laws of the Union may not reach." * * * "Without entering further into the delicate inquiry respecting the precise limitations which the several grants of power to Congress, contained in the Constitution, may impose on the State legislatures, than is necessary for the decision of the question before the court," etc.

And then he decides that the State of New York had power to pass the act complained of and that it was valid, except so far as it attempted to grant a discharge, and to that extent it violated the Federal Constitution.

The difficulties of definition of the powers of Congress growing out of the delegation to enact bankruptcy laws and its limitations, which troubled the mind of the Chief Justice, are now here for solution. That these expressions of his opinion were not the accepted opinion of the court is demonstrated by *Ogden v. Saunders*, 12 Wheat., 272. Justice Johnson there said that *Sturges v. Crowninshield* was more of a compromise than a judgment, and that the language of the opinion must not be extended beyond the certificate of the court.

It thus appearing clearly what power the Constitution intended to confer, it is proper to examine the judicial decisions to ascertain if they militate against this view, and, if so, to what extent.

The first case is *In re Klein*, 1 How., 277, which was decided by a divided *circuit* court. It was on appeal from the district court of Missouri in a bankruptcy proceeding wherein a discharge had been refused:

> "Because it considered the act of Congress under which said Klein asked to be discharged from all his debts, as being against the Constitution of the United States; and therefore the court had no power to grant such discharge."

It then came before this court *sub nomine*, *Nelson v. Carland*, 1 How. (1843), 266; but the court avoided a decision of this question and placed its judgment upon other questions decisive of the case.

Justice Catron, who had decided the case in the court *a quo*, illustrated the force of the silence of the court by himself delivering an opinion affirming his own opinion. No counsel appeared to assail the judgment.

In combating the opinion of the district judge he says:

> "The tenor and true spirit, of the English bankrupt laws, such as they were when our Federal Constitution was adopted, he has given, and I agree with him, that the act of 1841, in so far as it permitted the debtor at his own sole election, to come into court and coerce an extinction of his debts, and an abrogation of his contracts contrary to the will of his creditors, was in violation of the leading principles on which the English laws were founded."

If this was so, then bankruptcy was a legal term, and as such had a fixed and definite signification, and in using the word "bankruptcy" the Constitution intended exactly the same thing the term meant in England.

At this time no system of bankruptcy, *eo nomine*, existed in any of the continental countries. They had their "*cessio bonorum*," adopted from the civil law; but this only relieved the debtor from imprisonment; it did not discharge his future acquisitions from his debts. Return to England must be had before we find such a law, and even there we find no basis for the voluntary branch of the present act. It is unanimously conceded that the English acts were the source and basis of the bankruptcy clause in the Constitution.

> *Sackett v. Andross*, 5 Hill, *supra*, *per* Bronson, J.; *Hunter, arguendo, Sturges v. Crowninshield*, 4 Wh., 138, *et seq.*; *Federalist*, No. 42; *Elliott's Debates, infra*; *Nelson v. Carland*, 1 How., 269, *et seq.*; *Annals of Congress, infra*.

This term is introduced into the Constitution along with a host of others, such as "bill of attainder," "*ex post facto*" *laws*, "*habeas corpus*," "admiralty," "law and equity," to each of which has been assigned the same meaning they bore in the English law. They were technical terms, used in a technical sense, by men whose vocation was the science in which these terms were used. These others covered exactly the same grounds as they did when used in the law of England. Why single out this one term, and under its cover convey to Congress an unlimited power when its signification was as well defined as that of the others?

The gist of Justice Catron's reasoning is that because the State governments had such power before the grant by the Federal Constitution, and because these governments made a grant to enact uniform laws on the subject of bankruptcy, that therefore the Congress had unlimited power over the whole relation of debtor and creditor. This is clearly a *non sequitur*. The question is what was delegated, not the extent of the power possessed by the States.

The next case is *Kunzler v. Kohaus*, 5 Hill, 317; it attempts to place the adverse view upon another ground. As this case is only persuasive authority, we submit that the exhaustive dissenting opinion of Judge Bronson as found in *Sackett v. Andross*, 5 Hill, 393, propounds the true exposition of the law on the subject.

The term is used in its technical sense (*Endlich Inter. Stat.*, sec. 2).

> "Where a term used in a statute has acquired at common law a settled meaning, that is ordinarily the technical meaning which is to be given to it in construing the statute" (6 *Am. & Eng. Enc. Law*, 2nd ed., 921).
>
> "But where a word has acquired a fixed technical meaning in legal and constitutional history it will be presumed to have been employed in that sense in a written constitution (*id.*, 925).
>
> "So when the framers of the Constitution employ terms which in legislative and judicial interpretation have received a definite meaning and application which may be more restricted or general than when employed in other relations, it is a safe rule to give to them that signification sanctioned by legislative and judicial use" (*Carpenter v. State*, 4 How. (Miss.),

166; *Daily v. Swope*, 47 Miss., 383; *Calder v. Bull*, 3 Dall. (1798), 391; *Workman v. New York*, 179 U. S., *supra*).

There was no such general and popular sense as is here claimed (Bronson, J.; *Sackett v. Andross*, 5 Hill, *supra*).

Other cases, *contra*, are *In re Reiman*, 11 N. B. R., 21 (district court New York); *In re Silverman*, 4 N. B. R., 524 (district court Oregon); *United States v. Pusey*, 6 N. B. R., 284 (circuit court of Michigan). As these arise in inferior courts, they are not controlling and may be disposed of on similar grounds.

There are expressions *contra* in Story on the Constitution, 1106–1113, but Mr. Justice Bronson fully answers this position in *Sackett v. Andross*, 5 Hill, 346.

In *Thompson v. Alger*, 12 Met., 442, the point was raised but not argued, and to our contention they merely say it is settled by authority, which was far from the case, and *McCormick v. Pickering*, 4 Coms., 282, may be disposed of on similar grounds.

In *1 Elliott's Debates*, 302, we find this entry, August 29, 1787:

> "It was moved and seconded to commit the sixteenth article, together with the following proposition, 'To establish uniform laws on the subject of bankruptcies, and *respecting the damages arising on the protest of foreign bills of exchange*,' which passed in the affirmative; yeas—Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia—9; nays—New Hampshire, Massachusetts—2."

As originally proposed and passed by the convention, there was subjoined to it a power so clearly commercial that it is necessary, under all rules of legal construction, to refer this clause to the same subject-matter.

On September 1 Mr. Rutledge, on behalf of his committee, reported back this provision in the same words, save that the part that related to damages on bills of exchange was stricken out (1 *Ell. Deb.*, 310). Then on September 3 the entry is:

> "On the question to agree to the following clause of the report; 'To establish uniform laws on the subject of bankruptcies.' It passed in the affirmative."

Mr. Madison states that when the subject was brought up before the convention the English bankrupt laws were expressly named and referred to, and that Mr. Sherman was opposed to granting to Congress even the power as it was then known and understood (3 Mad. Pap., 1481).

In *Sturges v. Crowninshield*, 4 Wh., 122, Mr. Hunter, *arguendo*, says:

> "Very soon after the adoption of the Constitution, a bankrupt law was introduced into Congress; it was postponed on the ground that the State insolvent laws were sufficient. *The whole debate turns on the acknowledged and well-understood difference between the two laws* (Debates of Congress, vol. 2, p. 204)."

In answer to a petition "from the respectable towns of Norfolk and Portsmouth, in Virginia, complaining of its (act 1800) partial operation and injurious tendency," and praying that all men be included within the bankrupt act, this de-

bate took place in the House, and Mr. Newton, in February, 1803, said in part:

"The partiality complained of can, in my apprehension, have no other meaning than this: viz: that the provisions of that law are not made to extend to *every class and description of citizen. This partiality cannot be remedied.* This, sir, is not a mere assertion, nor is it a visionary speculation. This assertion is the result of an attentive and dispassionate examination of the Constitution of the United States. The Constitution gives to Congress power to make 'uniform laws on the subject of bankruptcies throughout the United States.' The word 'bankruptcies' was borrowed from the British statutes, and, as a legal phrase, its meaning is precise and definite. It is well understood and defined by the English jurists. The term 'bankrupt' means a trader, one who obtains his livelihood by buying and selling articles of merchandize, or depends for that livelihood, to a certain degree, on buying and selling articles of merchandize. If this definition of the word is the correct one, and I aver it to be so, the words 'bankrupt, trader and merchant' are synonymous; they are convertible terms, meaning one and the same thing. As such the *Constitution forbids us, nay, stays our hands* from extending the provisions of a bankrupt law to either the farmer, planter, mechanic or any class of citizens other than a trader or merchant.

"I am conscious that I am addressing myself to an enlightened assembly; to its better judgment I will submit, with all the deference and respect, which worth, talent, and virtue can inspire. If I am wrong, I solicit them to correct my errors. I likewise behold here professional gentlemen, whose skill in jurisprudence is great and undisputed. I pray these gentle-

men if I have deviated from legal ground, to point out the path by which I shall regain it, and I will retrace my steps.

"The silence of the gentlemen emboldens me to say, that the ground I have taken is firm and solid."

Annals of Congress, 7th Con., 2 sess., 1802–'03, p. 557.

No one attempted to answer him, and in November, 1803, when this act was again under consideration in the House, the same doctrine was maintained (*Annals of Congress*, 8th Con., 1 sess., 1803–'04, p. 616).

Mr. Woodberry (4 *El. Deb.*, 515) makes this clear statement of our contention:

"The gentleman on his right (Mr. Berrien) had said, that Congress might legislate without limitation, as to the objects or manner of a bankrupt system, because no limitation as to them had been expressed in the Constitution. But the limitation existed in the subject-matter of the grant. The grant was not to legislate on the subject of contracts generally—of descents, of suits at law—but on the subject of bankruptcy. To bankruptcies, and to bankruptcies alone, then was the power confined. And the word bankruptcies, as used in the Constitution, was never, in his apprehension, intended to extend beyond embarrassments and failures among mercantile men.

"The bankrupt system had been limited essentially to persons more or less engaged in trade. The word itself, as remarked last year by the gentleman from South Carolina, had been derived from the circumstance that the person coming within its operations, had his bench rupted or broken up. The bench of

whom? Not of the farmer—not of the mechanic—but the bench of the money-dealer, and the bench or counter of the merchant. Grant that some persons not strictly traders, may, at times have been included in the provisions of some laws on the subject of bankruptcies; yet this was where the power of legislation was unlimited—where all legislation, as to all creditors and debtors, was invested in one body. It has but seldom occurred anywhere, and *existed nowhere at the time of this grant of power to Congress.*

"That the laws on the subject of bankruptcies were then deemed commercial only is further manifest from the fact, that, when late in the session of the convention which framed the Constitution, this clause was introduced, it was coupled with a clause regulating the rate of damages etc. on bills of exchange. It was well known to our fathers that, in 13 distinct sovereignties, the laws, as to debtors and creditors, were, and must always be, in many respects very various, to meet their different usages, pursuits, prejudices and educations; but that the merchants, throughout the confederacy, must carry on their business in other and remote States from those where they resided, and, hence, as to their debts, their failures, and their adjustments of their affairs, it might be highly convenient and salutary to have similar rules and laws. In a Constitution, therefore, created in a great degree throughout, to benefit commerce, it was natural to confer power to make uniformity, or uniform laws, on a commercial subject. *It was impossible that Congress could, constitutionally, bring farmers and mechanics, by their individual consent, within the provisions of this act,* where they could not be compelled to come without consent. It was no question between Congress and those individuals: it was solely a question between the General Government and the individual

> States. He was opposed to this feature of the act; because, to pass it would be to bring subjects and citizens within the scope of the General Government never contemplated by our fathers."

This speech puts our contention so clearly that it is irresistible. Mr. Van Buren said in the Senate in January, 1826 (4 *El. Deb.*, 622):

> "At the time of the adoption of the Constitution, they (bankruptcy and insolvent laws) were known and distinguished both in England and in this country, as distinct systems—the one having for its object *to afford a summary and speedy remedy for creditors, against fraudulent or failing traders; the other affording relief to insolvent debtors of all denominations.*"

Special attention is requested to the rest of this speech.

In *Congressional Debates* (vol. 3, 1826–'27, p. 78–122) this whole question is discussed, and we respectfully submit that the arguments there advanced are uncontrovertible. To same effect is Mr. Madison's article in No. 42 of the *Federalist, supra.*

In *Adams v. Story*, 1 Paine's C. C. Rep. (N. Y., 1817), 79, Mr. Justice Livingston clearly pointed out the distinction between bankruptcy and insolvency, and it is maintained that by the use of this term "bankruptcy" in the Federal Constitution was meant what the term signified in the law of England at the time the Constitution was adopted.

Where there is division of opinion between judges of inferior courts, and the judge subordinate in rank maintains the unconstitutionality of an act of Congress, there must be the clearest and most cogent of reasons to require that he

shall dissent, and not accept the opinion of his superior, supported by the presumption of the validity of the act as well as the influence of the weight of the opinion of his superior in rank. Upon this ground the cases *In re Klein*, 1 How., 277; *Nelson v. Carland, id.*, 265; *In re Castleman, id.*, 281; *Collins v. Blyth, id.*, 282, are cogent authority to sustain our position.

Speaking of the difference between bankruptcy and insolvency, Mr. Justice Bronson maintains our contention thus:

> "These two sets of laws were not only distinct in their enactment, but they applied to different classes of persons, and were based upon different principles. The bankrupt laws were confined in their operation to merchants, traders, and persons who gained their livelihood by buying and selling; while the insolvent laws extended to all classes of imprisoned debtors. The bankrupt laws were set in motion by the creditor, and were a remedy in his hands for the collection of his debt; but the insolvent laws were set in motion by the debtor, for the purpose of obtaining his enlargement from prison. Under the bankrupt system the debt was discharged: the insolvent system left the debt unimpaired. The power delegated to Congress was to legislate upon one, and only one of these subjects, to wit, 'bankruptcy.'"

The opinion of Judge Wells, largely reproduced in the dissenting opinion of Justice Catron, in *Nelson v. Carland* 1 How., 269, fully and ably maintains our side of this cause. The argument of Mr. Hunter in *Sturges v. Crowninshield, supra*, is clear and unanswerable on this point (p. 138). The opinion of Chief Justice Marshall in that case clearly main-

tains that these two systems relate to the same subject, but that they are different in meaning and in operation.

The power of Congress was limited to laws on the subject of bankruptcies, as a then known system of laws. Being embodied in the Constitution with a certain, definite meaning, that meaning could not be changed by the evolution of time, circumstance, or convenience. If the power as delegated meant jurisdiction over traders, at the suit of creditors to compel a distribution of their assets, it could not acquire a different meaning afterwards, and be interpreted to have non-commercial attributes, and be converted into a remedy on behalf of non-commercial as well as commercial classes, essentially, against their creditors instead of by the creditors against them. It would be curious if under article III, section 2, of the Constitution, extending jurisdiction of the Federal courts "to all cases of admiralty and maritime jurisdiction," Congress should enact that a proceeding might be brought by any ship in its own name to compel all persons claiming any liens thereon to propound the same and to have itself sold to pay the same. As with admiralty, so with bankruptcy, it meant a definite thing, and neither can be interwoven with local law so as to change its essential characteristics. If insolvency proceedings had been intended to be embraced in the delegation, it would have been easy to have done so, but the word bankruptcy was knowingly and intentionally used. The power was delegated in this form, and it cannot be expanded by the donee of the grant beyond its express or necessarily implied terms.

In *Workman v. New York*, 179 U. S., 561, it is said:

> "The general system of maritime law which was familiar to the lawyers and statesmen of the country

when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction'! * * * It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction is well understood. It treats the matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law' without defining those terms, assuming them to be known and understood."

"A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem more desirable. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it" (*Cooley, Const. Lim.*, 5th ed., 67–'8; *Ex parte* Milligan, 4 Wall., 2, 120; *Dred Scott v. Sanford*, 19 How., 393; *People v. Blodgett*, 13 Mich., 138.

Congress clearly understood the difference in the enactment of the act of 1800, for by section 61 the then existing insolvent laws were recognized and were given force except where in conflict with the act of Congress. The act of 1800, the first interpretation of the Constitution, and within thirteen years after its promulgation, did not embrace any but traders and had no voluntary feature. The act of 1841 extended the remedy to voluntary petitioners other than traders, and this was so out of joint with the settled views of the country that the act, because thereof, was repealed in a very short time.

It was only after the civil war that an attempt was first

made to entirely break away from the real meaning of the Constitution. Society was then laboring under the baneful effects of the war, and the cloud of unreasoning war had cast its shadows over the pristine light of interpretation of the Constitution. The civil war in its necessary recast of society settled many questions contrary to their accepted constitutional meaning. So, with a disrupted and a bankrupt country, Congress deemed it wise to break through the limitations and create a commercial amnesty act by the act of 1867. Fortunately it never became necessary for this court to decide whether this legislation was or not constitutional. Now, in the full light of the Constitution, the court is called to declare the validity or invalidity of such legislation.

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APPENDIX.

PROVISIONS OF THE BANKRUPT ACT OF 1898 INVOLVED IN THIS CONTROVERSY.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

SEC. 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the district of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; * * * (11) determine all claims of bankrupts to their exemptions; * * * (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; * * * (14) extradite bankrupts from their respective districts to other districts.

SEC. 4. WHO MAY BECOME BANKRUPTS.—*a.* Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

b. Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any

unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under State or territorial laws, may be adjudged involuntary bankrupts.

SEC. 6. EXEMPTIONS OF BANKRUPTS.—*a.* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

SEC. 8. DEATH OR INSANITY OF BANKRUPTS.—*a.* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

SEC. 9. PROTECTION AND DETENTION OF BANKRUPTS.—*a.* A bankrupt shall be exempt from arrest upon civil process except in the following cases: * * * (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

SEC. 12. COMPOSITIONS, WHEN CONFIRMED.—*a.* A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

b. An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the

consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c. A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d. The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e. Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

SEC. 14. DISCHARGES, WHEN GRANTED.—*a.* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.

SEC. 7. DUTIES OF BANKRUPTS.—* * * (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concern-

ing the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

SEC. 16. CODEBTORS OF BANKRUPTS.—*a*. The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—*a*. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

SEC. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.—*a*. Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.

SEC. 20. OATHS, AFFIRMATIONS.—*a*. Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

SEC. 21. EVIDENCE.—*a*. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a

referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act.

e. A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

g. A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—*a.* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

SEC. 57. PROOF AND ALLOWANCE OF CLAIMS.—* * *

c. Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities. * * *

g. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences. * * *

j. Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which

the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

SEC. 59. WHO MAY FILE AND DISMISS PETITIONS.—*a.* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt. * * *

c. In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

SEC. 63. DEBTS WHICH MAY BE PROVED.—*a.* Debts of the bankrupt may be proved and allowed against his estate which are * * * (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt, * * * and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

SEC. 64. DEBTS WHICH HAVE PRIORITY.—*a.* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b. The debts to have priority, except as herein provided and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

SEC. 65. DECLARATION AND PAYMENT OF DIVIDENDS.—* * * *c.* The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

SEC. 67. LIENS.—* * * *d.* Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the

creditors of such debtor by the laws of the State, Territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

SEC. 70. TITLE TO PROPERTY.—*a.* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.